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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 403

WILLIAM MAHER, PETITIONER,

V.

THE STATE OF NEBRASKA, RESPONDENT.

RESPONDENT'S BRIEF IN RESISTANCE TO APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI.

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WEKESSER PUBLISHING CO., Law Briefs, Lincoln, Nebr.

INDEX

Subject Index

Pages

Introduction ---------- 1
Opinion of Nebraska Supreme Court ---------- 2
Statement of the Case ---------- 2
Statement of the Case, Re Speedy Trial ---------- 6
Argument, Summary ---------- 10
Point 1, Petition Not Accompanied by Record ---------- 12
Point 2, State Statute Constitutional ---------- 15
Point 3, Information Valid, Does Not Deny Due Process ---------- 19
Point 4, Arraignment Was Had, But Failure to Arraign is Not Denial of Due Process ---------- 20
Point 5, Denying Continuance—no Federal Question ---------- 25
Point 6, Sufficiency of Evidence—no Federal Question ---------- 26
Point 7, 14th Amendment Does Not Guarantee Speedy Trial in State Court ---------- 27
Point 8, Entire Record, Taken Together, Presents No Case of Denial of Due Process ---------- 35

Table of Cases Cited

Avery v. Alabama, 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377 ---------- 26
Avery v. State, 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377 ---------- 14
Ball v. Nelson, 45 Neb. 205, 63 N. W. 361 ---------- 22
Bandini Petroleum Company v. Superior Court, 52 Sup. Ct. 103, 284 U. S. 52, 76 L. Ed. 136 ---------- 19

Pages

Bergeman v. Backer, 157 U. S. 656, 15 Sup. Ct. 727, 39 L. Ed. 845 ---- 20
Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252 ---- 14, 28, 35
Block v. Kearney, 6 Ca. Unrep. Cases 660, 64 Pac. 267 ---- 21
Bolln v. Nebraska, (1900) 176 U. S. 87, 20 Sup. Ct. 287, 44 L. Ed. 382 ---- 28
Brown v. New Jersey, (N. J. 1899) 175 U. S. 174, 20 Sup. Ct. 77, 44 L. Ed. 119 ---- 28
Brown v. Ritner, 41 Neb. 52, 59 N. W. 360 ---- 22
Brown v. Walker, (Pa. 1896) 161 U. S. 606, 16 Sup. Ct. 644, 40 L. Ed. 819 ---- 28
Caldwell v. Texas, 137 U. S. 698, 11 Sup. Ct. 224, 34 L. Ed. 816 ---- 20, 35
Central Land Company v. Laidley, 16 Sup. Ct. 80, 159 U. S. 112, 40 L. Ed. 91 ---- 27
Cockeram v. State, 121 Neb. 757, 238 N. W. 524 ---- 26
Cornell v. State, 138 Neb. 708, 294 N. W. 851 ---- 26
Eilenbecker v. Plymouth County, 134 U. S. 35, 10 Sup. Ct. 424, 33 L. Ed. 801 ---- 28
Filer v. State, 36 Sup. Ct. 550, 241 U. S. 648, 60 L. Ed. 1220 ---- 27
Flanagan v. State, 127 Neb. 640, 256 N. W. 321 ---- 26
Ford v. State, 46 Neb. 390, 64 N. W. 1082 ---- 22
Frank v. Mangum, 237 U. S. 309, 59 L. Ed. 969, 35 Sup. Ct. 582 ---- 27, 35
Frankel v. Woodrough, 7 Fed. (2d) 796 ---- 40
Franklin v. South Carolina, 30 Sup. Ct. 640, 218 U. S. 161, 54 L. Ed. 980 ---- 26
Furness, Withy & Company v. Yang-tsze Insurance Company, 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409 ---- 14

INDEX—Continued

Pages

Gaines v. Washington, 277 U. S. 81, 72 L. Ed. 793, 48 Sup. Ct. 468 ---- 28

Garland v. Washington, 34 Sup. Ct. 456, 232 U. S. 642, 58 L. Ed. 772 ---- 23

Garneau v. Omaha Printing Company, 42 Neb. 847, 61 N. W. 100 ---- 22

High Grade Provision Company v. Sherman, 45 Sup. Ct. 141, 266 U. S. 497, 69 L. Ed. 402 ---- 18

Howard v. Kennedy, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421 ---- 18

Howard v. Kentucky, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421 ---- 28

Hurtado v. California, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232 ---- 30

Jordan v. Massachusetts, 225 U. S. 167, 56 L. Ed. 1038, 32 Sup. Ct. 651 ---- 25

King v. West Virginia, 30 Sup. Ct. 225, 216 U. S. 92, 54 L. Ed. 396 ---- 19

In re Krug, 79 Fed. 308 ---- 24

Minder v. Georgia, 183 U. S. 559, 46 L. Ed. 328, 22 Sup. Ct. 224 ---- 26

Minnesota, ex rel. Pearson v. Probate Court, 60 Sup. Ct. 523, 309 U. S. 270, 84 L. Ed. 774, 126 A. L. R. 530 ---- 19

Palko v. Connecticut, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288 ---- 28, 32, 39

People v. Chimovitz, 237 Mich. 247, 211 N. W. 620 ---- 18

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. 55, 84 A. L. R. 527 ---- 14

Reed v. State, 147 Ind. 41, 46 N. E. 135 ---- 22

In re Robertson, 156 U. S. 183, 15 Sup. Ct. 324, 39 L. Ed. 389 ---- 20

Pages

Seaboard Air Line Ry. v. Koennecke, 36 Sup. Ct. 126, 239 U. S. 352, 60 L. Ed. 324 ---- 26
Smith v. State, 109 Neb. 579, 191 N. W. 687 ---- 26
Snyder v. Massachusetts, 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 595 ---- 36
Spies v. Illinois, (Ill. 1887) 123 U. S. 131, 166, 8 Sup. Ct. 21, 22, 31 L. Ed. 80 ---- 28
Taylor v. State, 86 Neb. 795, 126 N. W. 752 ---- 26
Ward v. Urmson, 40 Neb. 695, 59 N. W. 97 ---- 22
West v. Louisiana, (La. 1904) 194 U. S. 264, 24 Sup. Ct. 650, 48 L. Ed. 965 ---- 28, 29

Nebraska Statutes Cited

Laws of Nebraska 1935, page 216 ---- 16
Sec. 27-303, Comp. St. Supp. ---- 22
Sec. 28-5,101, Comp. St. Supp. 1941 ---- 10, 16
Sec. 29-1203, Comp. St. 1929 ---- 8
Sec. 29-1501, Comp. St. of Neb. ---- 20
Sec. 29-1815, Comp. St. 1929 ---- 23

Text Books Cited

Robertson's "Practice and Procedure," page 31 ---- 13
15 C. J. 898 ---- 21
4 C. J. S. 1592 ---- 21
21 C. J. S. 256 ---- 21

Court Rules Cited

Rule 10 ---- 13
Rule 38 ---- 13

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WALTER R. JOHNSON, Attorney General,
of Lincoln, Nebraska,
H. EMERSON KOKJER, Deputy Attorney General,
of Lincoln, Nebraska,
RUSH C. CLARKE, Assistant Attorney General,
of Lincoln, Nebraska,
For Respondent.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This is an application by one William Maher for a writ of certiorari to review a judgment of the Supreme Court of Nebraska, entered March 17, 1944, in a cause therein

pending entitled William Maher, plaintiff in error v. The State of Nebraska, defendant in error, affirming a judgment of the District Court of Douglas County, Nebraska, convicting the plaintiff in error of the crime of fourth degree arson and sentencing him to the Nebraska penitentiary for a period of two years.

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Nebraska is reported in 13 N. W. (2d) 641, and in 13 S. C. J. (Nebraska Supreme Court Journal) 201. It will be published in Vol. 144 of the Nebraska Supreme Court Reports.

STATEMENT OF THE CASE.

The petitioner's statement of the case is not set out in his brief, but is found in his petition for writ of certiorari (pp. 2-14). It is somewhat inaccurate and misleading, although probably not more so than should be expected in view of the limited portions of the record which petitioner has submitted to this court.

As the writer understands the law and the rules of this court, it is the duty of him who seeks a review by writ of certiorari to file a petition "accompanied by a certified transcript of the record," unless the parties stipulate, under paragraph 8 of rule 38, to omit from the record unnecessary parts thereof. In the case at bar the petitioner made no effort to shorten the record by stipulation. He did attempt to follow the appeal practice by serving upon respondent a notice of the filing of his praecipe, advising the respondent that he might, within ten days, designate other portions of the record, in addition to those indicated by him, as material to a review of the case (R. p. 131). This was obviously an attempt

to cast upon the State the burden of paying for the entire record. The State did, in order to get one or two little matters into the record, designate a couple short portions which it desired to have included in the transcript, but did so "without waiving but at all times reserving its objection" to petitioner's procedure, and without waiving its contention that the petition should be accompanied by a certified transcript of the entire record (R. p. 132).

This designation of additional portions of the record filed by the State was not intended to, and we do not believe it does, operate as a stipulation under paragraph 8 of rule 38. Also, the record submitted is so confusing, owing to the failure to assemble it in chronological order that it is practically impossible to understand it.

The nature of the constitutional question presented by respondent renders it essential that the entire record be before the court, yet petitioner has submitted less than five percent of the evidence in the case.

It may be gleaned from the record which has been submitted that in the State Supreme Court the transcript of the proceedings in the trial court contained at least 63 pages (R. p. 127), and that the bill of exceptions consisted of at least four volumes, totaling more than 706 pages (R. p. 130).

In connection with petitioner's contention that he was denied due process by being compelled to go to trial with a sick lawyer, this court will not be able to learn from the record whether petitioner was ably defended, whether, and if so the extent to which, his sick counsel was physically able to unnecessarily prolong the trial by

lengthy cross-examinations, and dilatory tactics, and whether during the trial his counsel indicated sufficient quarrelsomeness to negative the idea that he was too ill to proceed.

However, it does appear from the record here that the suggestion of counsel's illness arose in connection with an attempt to secure a continuance on the ground of the absence of allegedly material witnesses, and was an afterthought in connection with efforts to delay the trial. At the very outset counsel announced to the court that before filing a challenge to the array he wanted to move for a continuance on the ground that *one* of his witnesses was in the army (R. p. 73). Nothing was then said about any trouble Mr. North was having with his health. At noon on that day the court was about to recess until 1:30 p.m. (R. p. 73). The practice in Omaha has always been to commence the afternoon session at 2:00 p.m. and Mr. North preferred to start at that time, saying that he had been sick the previous week and had only been down town once or twice during that time (R. p. 73). He did not contend he was too ill to proceed, said simply: "I get so all in" (R. p. 73). The court asked what counsel desired, and he answered, "I would like to have two hours at noon" (R. p. 73). This request was granted by the court (R. p. 73).

By 2:00 p.m. Mr. North was ready with his motion for continuance. Although in his motion he claimed to be too ill to proceed (R. p. 74) and produced a rather weak ill-health certificate (R. p. 85), the main burden of the motion was that proposed co-counsel was absent from the city (R. p. 75) and that seven witnesses were absent (R. pp. 76-80) and one dead (R. p. 75).

The court overruled the motion for continuance, but stated that the court would observe short hours and that Mr. North might have a rest at any time he cared to say he wasn't feeling well (R. p. 82).

It also appears that before the State had even completed its case in chief, Mr. North was willing that the court should take up at 1:30 in the afternoons (R. p. 134) and being asked by the court whether he was feeling better, answered, "Yes" (R. p. 135).

From the record, also, may be gleaned the following concerning counsel's physical ability to conduct the trial: He filed a long motion to quash the information on February 2, 1943 (R. p. 6); he appeared and argued this on February 8, 1943 (R. p. 81); between February 23 and March 6, although he was apparently confined to his house three days on one occasion and two days on another (R. p. 85) he was in his office part of the time transacting business, and tried some cases (R. p. 82); on Saturday, March 6, 1943, he filed a demurrer and a request for separate trial (R. pp. 9-10); on Monday, March 8, he argued his demurrer (R. p. 10), made an astonishingly long motion for continuance (R. pp. 74-82), and argued it (R. p. 10); then he moved to quash the jury panel and spent the rest of Monday and part of Tuesday on that phase of the case (R. p. 11), spent almost an entire day examining jurors on voir dire (R. p. 12), made the defense's opening statement (R. p. 12), and consumed three days (with a two-day week-end recess intervening) trying a case (R. pp. 12-13) which should not have occupied the court for more than a day and a half, to judge by the facts as disclosed in the opinion (R. p. 99, et seq.). Even the skeletonized record sub-

mitted to this court discloses that counsel conducted himself with energy (R. pp. 45, 55, 72), dictating alarmingly long motions for continuance (R. p. 74) and for directed verdicts (R. pp. 87, 91).

State of the Record Re Speedy Trial.

An inaccuracy in petitioner's statement of the case may be noted in connection with his charge (Petition, p. 5) that he demanded trial on three or four occasions and continually sought a speedy disposition of this case, and that his counsel was energetically demanding trial in the district court at all times.

The fact is that it appears by the record that no demand for trial, speedy or slow, was made. Petitioner complained that he was prejudiced by the failure of the State to accord him a speedy trial because he was put on trial at a time when certain material witnesses were absent and unavailable. The record discloses his contention that his witnesses were present and could have testified during the first six months of 1942 (R. p. 87), and that they were absent from then on until the date of trial. The record discloses that the information was filed in the district court March 17, 1942 (R. p. 5). The record contains nothing to indicate whether court was in session between March and June, 1942, contains nothing indicating whether the court adjourned in April or May for the summer, or otherwise indicating whether it was possible to try the case in the district court before July, 1942.

Nor does the record show any demand whatever that the trial be had during that period.

There is some testimony in the record tending to establish, without fixing dates, that some effort was made by the defendant to get to trial, but this is rather hazy. The petitioner testified (not in support of any motion to discharge him prior to the trial, but as a part of his defense in chief) that he had asked "members of the county attorney's office" when his trial was to be held (R. p. 66). At the respondent's request the record includes also an additional portion of petitioner's testimony wherein he admitted that he never talked to the county attorney or to Mr. Garrotto (the chief deputy) or Paul Steinwender (chief clerk), or to Mr. Fiedler (the deputy who was handling his case) (R. pp. 133-4).

While he says he talked to "different members" of the county attorney's staff (R. p. 133, Q. 2640), he does not remember who they were (R. p. 133, Q. 2641). Later, he decided that he only talked to one man (R. p. 133, Q. 2652) and he does not know who that was (R. p. 134, Q. 2654). He never asked the court for trial (R. p. 134, Qs. 2659-60), and knows of no instance when his attorney applied to any court and made a demand for trial (R. p. 134, Q. 2663).

It further appears by the sworn testimony of Mr. Brome, chief deputy county attorney at the time of the trial (R. p. 81), that shortly after January 6, 1943, the case was noticed for trial on February 8, 1943 (R. p. 81); that defendant filed a motion to quash which was argued and submitted (R. p. 81) and that although the defense did resist the State's motion for a continuance in February, no contention of any kind was then made about the absence of any material witnesses (R. p. 82). It further appears by Mr. Brome's testimony that the defendant

took no further action toward securing an early trial (R. p. 82).

Section 29-1203, Comp. Stat. 1929, provides:

> "If any person indicted for any offense, who has given bail for his appearance, shall not be brought to trial before the end of the third term of the court in which the cause is pending, held after such indictment is found, he shall be entitled to be discharged, so far as relates to such offense, unless the delay happen on his application, or be occasioned by the want of time to try such cause at such third term."

This statute is copied in the opinion of the Nebraska Supreme Court (R. pp. 107-8).

There is nothing in the record, however, to indicate when the terms of court were held, whether three, or two, or even one term had expired. If will, no doubt, be admitted that the petitioner had given bail and that three terms had not expired, and the Nebraska Supreme Court said in its opinion:

> "The defendant, having failed to bring himself within the provisions thereof (the above-quoted statute), is not entitled to be discharged under its terms."

Since the record fails to contain all the evidence in the case, it fails to establish anything as to the materiality of the testimony of these absent witnesses. One may glean from the record, however, that their testimony was absolutely immaterial. It appears by the opinion of the Supreme Court of Nebraska that the defendant was caught in a restaurant between 3:30 and 4:00 a.m. on the morning of February 25, 1943, apparently preparing to set a fire (R. pp. 110-111). Petitioner contended that

he had been drinking beer in this restaurant for some time, but does not claim that he came to the restaurant until 12:30 or 1:00 a.m. (R. p. 112).

But as to these absent witnesses, it affirmatively appears by the record (R. pp. 56-60) that they could have testified only to events occurring several days before the commission of the alleged crime, and to eating, drinking, and talking politics in the early evening of February 24, hours before defendant, according to his own story, went to the scene of the crime.

For instance, the witnesses William Josephs, Rudy Bruem, Harry Ostrom, Emmett Gardiner, and Harry Kane were simply persons who are alleged to have seen defendant eating in a restaurant between 4:30 p.m. and 8:00 p.m. the afternoon before (R. pp. 57-59). In this connection it is to be observed that the only showing concerning the materiality of the testimony of these witnesses (and that is a very weak showing) appears in connection with a motion for continuance (R. pp. 75-81). In the motion to discharge, which was combined with a motion for a directed verdict (R. p. 87) no showing is made that the absent witnesses' testimony was material or that the defendant was prejudiced by their absence.

Nor does the record disclose any excuse for defendant's failure to take the deposition of these witnesses, although counsel was aware of his right to do so (R. p. 8), and sought a continuance for that purpose.

In connection with the complaint that petitioner demanded and was denied an immediate preliminary hearing before the examining magistrate on February 7, 1942 (Petition p. 3), it may be pointed out that defendant

was free on bail prior to the preliminary hearing (R. p. 4).

Perhaps also it should be pointed out that the references on page 3 of the petition to page 51 of the record are to an exhibit not in evidence and not properly a part of the record (R. p. 50).

ARGUMENT.

Summary.

The petitioner has failed to accompany his petition with "a certified transcript of the record in the case" as required by Rule 38. Instead, he has sought to follow the procedure provided for appeals, has filed a small part of the record and served a copy of his praecipe upon respondent.

This procedure is improper and the petition should be denied for failure to file the entire record. This is especially true in the instant case where it is claimed petitioner was denied the effective assistance of counsel and where it is claimed certain absent witnesses had material testimony to offer.

The statute (Comp. St. Supp. 1941, Sec. 28-5,101) defining fourth degree arson has been construed by the Nebraska Supreme Court as requiring the State to prove malice and wilfullness and as being clear and unambiguous; this construction is binding upon this court, and the statute is not violative of the due process clause of the 14th Amendment.

The information filed by the State under this statute properly advises the defendant of the accusation against

him. The Nebraska Supreme Court has held it sufficient. Whether an indictment charges an offense is for the state court, and no federal question is presented.

It is not necessary in Nebraska, by express statute, nor under the Federal Constitution, that an indictment or information conclude with the words "contrary to the form of the statutes in such case made and provided and contrary to the peace and dignity of the people of the state of Nebraska."

As to the claimed failure to arraign, the fact is the defendant was arraigned and stood mute, as the indisputable record of the court shows; it is claimed petitioner was arraigned in the judge's private office; the record does not show this to be true, but assuming it to be true, under the law of Nebraska the judge's office is part of the court and judicial proceedings held therein are valid.

Further, the claim is that this arraignment is void. If that be granted, the Nebraska statute provides that one who goes to trial, with counsel, without being arraigned, shall be deemed to have pleaded not guilty.

Finally, arraignment is not necessary to due process, and the State could entirely do away with arraignments without violating the 14th Amendment.

The trial court did not err in overruling defendant's motion for continuance, made on the morning of trial. The motion was addressed to the discretion of the court, which discretion is very wide when the motion is made on the eve (or morn) of trial. At all events, except in cases of unusual abuse of discretion, no federal question is presented by a ruling on a motion for a continuance.

As to the sufficiency of the evidence, this court could not pass on it in any event because the evidence is not before the court. But the claimed insufficiency of the evidence presents no federal question, since the due process clause implies no guarantee against an erroneous verdict in a state court.

With reference to petitioner's claim that he was denied a speedy trial, he was tried within the statutory period fixed by the Nebraska legislature and within a period which the Nebraska court holds meets the requirements of the State Constitution as to speedy trial.

The 14th Amendment to the Federal Constitution does not guarantee a speedy trial in a state court. The denial of a speedy trial could only raise a federal question where, together with other factors, this court could say that the State had violated the fundamental principles of justice.

Under all the facts presented by this record, this petitioner had a perfectly fair trial, his counsel was allowed the utmost latitude, he has had his day in the Supreme Court, and no fundamental principles of justice and fairness have been violated. Accordingly no federal question is presented by the record.

Point 1.

Certiorari Should be Denied Because the Petitioner Has Failed to Accompany His Petition With a Certified Transcript of the Record in the Case.

The printed record does not purport to contain the record in the case, but only isolated portions of it, aggregating but a small part of the record.

The petitioner seems to have attempted to get into this court by a combination of the procedure required for certiorari and that governing appeals. He filed a praecipe for certain portions of the record (R. p. 126) and then served a notice on respondent (R. p. 131) as required by the rule relating to appeals. The State of Nebraska certainly was not going to pay out several hundred dollars to furnish petitioner's record for him, although we did suggest a couple dollars worth of the evidence (R. p. 132) with all manner of reservations, objections, and disavowals.

Paragraph 1 of Rule 38 requires that the petition be accompanied by a "certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed."

The writer knows of no case passing squarely on this matter, but "the record in the case" certainly means all of the record. Mr. Robertson in his "Practice and Procedure," page 31, says that it is the practice to bring up the entire record except where unnecessary matter is omitted by some recognized and authorized method.

The writer of this work suggests that the provision of Rule 10 for the filing of a praecipe calling for only certain parts of the record is sometimes followed in certiorari cases but this is apparently upon the theory that counsel find themselves in agreement as to what should be contained in the record. Apparently this procedure assumes that counsel are, in effect, stipulating as provided by paragraph 8 of Rule 38. That situation does not exist here because we specifically objected to anything short of the whole record.

In *Furness, Withy and Company* v. *Yang-tsze Insurance Company*, 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409, the court said that a petition for a writ of certiorari is at the risk of the party making it.

At all events, this is true: Where denial of the constitutional right to the assistance of counsel is urged as a denial of due process, this court is required to scrupulously review the record. *Avery* v. *State*, 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377. And the alleged denial of due process is to be tested by an appraisal of all the facts in the case. *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252. And the court cannot scrupulously review the record and test it by appraising the totality of the facts unless all of them are before the court. More especially is this true where the assertion of lack of counsel depends upon the degree of fever and the extent of the alleged lack of ability of counsel, because while in *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. 55, 84 A. L. R. 527, it was held that due process was denied, this was not upon the theory that the 14th Amendment guaranteed the right to counsel, but rather because under the facts in that particular case the assigning of the entire bar of the district as counsel for the defense, in effect, denied the defendants more than the mere semblance of a trial, and because "the trial was conducted in disregard of every principle of fairness." *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252.

In *Betts* v. *Brady*, supra, it is said:

> "Due process of law is secured against invasion by the federal government by the Fifth Amendment and is safeguarded against state action in identical

words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.

* * *

"As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."

Point 2.

Sec. 28-5,101, Compiled Statutes 1941, Defining Fourth Degree Arson Does Not Violate The 14th Amendment And Is Constitutional And Valid.

The petitioner contends that the statute under which he was prosecuted is unconstitutional and void as being in contravention of Section 1 of the 14th Amendment. He contends that this is so because the statute is vague

and indefinite in that no ascertainable standard of guilt is set up by the law, is unreasonable and arbitrary, etc. (Petitioner's brief, p. 86).

In 1935 the legislature of Nebraska adopted an act (Laws of Nebraska 1935, p. 216) defining the various degrees of arson and providing penalties for such offences. The title of the act was:

> "An Act relating to crime and punishments; to define the crime of arson in its various degrees; to provide penalties therefor; and to repeal Sections 28-501, 28-502, 28-503, 28-504, and 28-505, Compiled Statutes of Nebraska, 1929."

The fourth section of this act is now Section 28-5,101, Comp. St. Supp. 1941, and reads as follows:

> "Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall be guilty of arson in the fourth degree and upon conviction thereof be sentenced to the Penitentiary for not less than one nor more than two years or fined not to exceed One Thousand Dollars. The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same shall, for the purpose of this act constitute an attempt to burn such building or property."

The ingenious argument of the petitioner is that the words "wilfully and maliciously" in the first line of this

section are not to be construed in connection with the words "who commits any act preliminary thereto" in the fifth and sixth lines; that therefore an innocent act preliminary to the setting of a fire may constitute a violation of the law. It was argued in the state court that under this statute a person who threw some old newspapers in the basement, with perfectly innocent intent, would be committing an act preliminary to the setting of a fire, so that if some third person should set fire to the papers and burn the building, the person who innocently left the papers in the basement would be guilty of fourth degree arson.

But the Supreme Court of Nebraska held as a matter of law that "the words 'wilfully and maliciously' apply to those 'who commit any acts preliminary thereto or in furtherance thereof' " and that "the words 'thereto' and 'thereof' apply to 'attempts to set fire to or attempts to burn.' "

And the court added that when the sentence of which the defendant complained was read in relation to the entire act its meaning was certain and clear and the statute was constitutional.

In the first place, it is difficult to find anything indefinite or vague or uncertain in this act which brings the case within the rules laid down in the decisions cited by petitioner (his brief, pp. 90-100). And as construed by our Supreme Court, even petitioner's fancied objections disappear. But even if there were some elements of uncertainty and lack of definiteness in the statutes, it would not follow that enforcement of a statute in a proper case is a denial of due process.

A criminal statute is not lacking in due process of law merely because the application of its prohibition may be uncertain in exceptional cases, especially where the act defined is made criminal only when performed with a specific intent. *High Grade Provision Company* v. *Sherman,* 45 Sup. Ct. 141, 266 U. S. 497, 69 L. Ed. 402.

In *People* v. *Chimovitz,* 237 Mich. 247, 211 N. W. 650, the Michigan Supreme Court held that an arson statute was not violative of the due process clause simply because it did not expressly make exceptions in the case of a harmless destruction of useless buildings, since such an exception was capable of being read into the statute.

The burden of petitioner's brief on this point is that the Supreme Court of Nebraska decided the constitutional question he presented to it wrong. But this court cannot overrule the construction placed on this statute by the Nebraska court. As was said in *Howard* v. *Kentucky,* 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421:

> "He seems to make an issue with the court of appeals of the state upon the law of the state, and to contend that the court erred in the interpretation and application of that law. This contention encounters the ruling in *Re Converse,* 137 U. S. 624, 631, 34 L. ed. 796, 11 Sup. Ct. Rep. 191, and other cases, which hold that a 'state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.'
>
> "We cannot assume error in the decision of the court of appeals. We accept it, as we are bound to do, as a correct exposition of the law of the state—common, statutory, and constitutional."

See also *Bandini Petroleum Company* v. *Superior Court*, 52 Sup. Ct. 103, 284 U. S. 52, 76 L. Ed. 136; *Minnesota, ex rel. Pearson* v. *Probate Court*, 60 Sup. Ct. 523, 309 U. S. 270, 84 L. Ed. 774, 126 A. L. R. 530; *King* v. *West Virginia*, 30 Sup. Ct. 225, 216 U. S. 92, 54 L. Ed. 396.

Point 3.

The Information States a Cause of Action Under the State Law and Meets All Requirements of the Federal Constitution.

The petitioner contends (p. 64, his brief) that the information violates the due process clause of the 14th Amendment in that it is incoherent, indefinite, uncertain, lacking in clarity, and failed to advise him of the nature and cause of the accusation made against him.

His first contention is that it is bad because the words "contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Nebraska" do not appear at the end of Count 1. He makes no contention that the information should also charge the defendant with "not having the fear of God before his eyes and being moved and seduced by the instigation of the Devil." It seems to the writer he should insist on that, also, because these words, which used to appear in common law indictments, are about as important as the rhetorical flourish with which counsel feels all informations should close.

It is true that in Nebraska we ordinarily end an information with the impressive phrase which is so dear to the petitioner's heart, but the legislature of this state

has provided that such language is absolutely unnecessary.

Section 29-1501, Comp. St. of Nebraska, 1929, provides:

> "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stated, arrested, or in any manner affected * * * by omitting to charge any offense to have been contrary to the statute or statutes."

This court has repeatedly held that whether an indictment sufficiently charges an offense under a state law is for the state court to determine. *Bergeman* v. *Backer,* 157 U. S. 656, 15 Sup. Ct. 727, 39 L. Ed. 845; *In re Robertson,* 156 U. S. 183, 15 Sup. Ct. 324, 39 L. Ed. 389; *Caldwell* v. *Texas,* 137 U. S. 698, 11 Sup. Ct. 224, 34 L. Ed. 816.

In *Caldwell* v. *Texas,* supra, this court said:

> "No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the state courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to."

Point 4.

The Record Shows That Petitioner Was Arraigned Before His Trial, But At All Events Arraignment Is Waived By Proceeding to Trial Without Objection and This is a Matter of State Procedure Not Involving Any Question of Due Process.

Petitioner raises the point (his brief, pp. 70-78) that he was denied due process because no plea was ever

entered on the information, and no legal arraignment was had. This involves a matter of state procedure and certainly, even if petitioner's construction of the record were correct, no federal question of denial of due process would be presented.

But to begin with, petitioner persists in ignoring and misconstruing the record and refusing to pay any attention to the state law on this subject. The journal entry of the district court (R. p. 11) recites that the defendant was "duly arraigned and stands mute and refuses to plead, and the court enters a plea of not guilty as to Count 1 and a plea of not guilty as to Count 2 of the information."

The same journal entry further recites that a jury was then impaneled, and the succeeding journal entries (R. p. 12) disclose that the trial then proceeded without further objection.

The petitioner contends that he was arraigned in the judge's private office and that he could not be arraigned there, and that the attempted arraignment is therefore void. He attempted to show this after the final decision of the Supreme Court of Nebraska by suggesting a diminution of the record (R. pp. 117-120), but his motion in this connection was denied (R. p. 126). This, too, presents a matter of state procedure, but obviously the Supreme Court was right in refusing to permit a diminution of the record after judgment. 4 C. J. S. 1592. In the second place, the court was right in overruling the motion for the reason that arraignment in the judge's private office adjoining the court room is, in fact, arraignment in open court. 21 C. J. S. 256; 15 C. J. 898; *Block*

v. *Kearney,* 6 Ca. Unrep. Cases 660, 64 Pac. 267; *Reed* v. *State,* 147 Ind. 41, 46 N. E. 135.

The Nebraska statute (Comp. St. Supp. 1941, Sec. 27-303) provides that:

> "All terms of the district court shall be held at the county seat in the court house, or other place provided by the county board * * *"

In the third place, as heretofore pointed out, the journal entry shows that petitioner was arraigned in open court and this cannot be contradicted by other evidence, such as was offered in the attempt to supplement the record. Under the Nebraska law, the approved journal entry of the proceedings in the district court is the only and the indisputable evidence of the action of the court. *Brown* v. *Ritner,* 41 Neb. 52, 59 N. W. 360; *Ball* v. *Nelson,* 45 Neb. 205, 63 N. W. 361; *Ward* v. *Urmson,* 40 Neb. 695, 59 N. W. 97; *Garneau* v. *Omaha Printing Company,* 42 Neb. 847, 61 N. W. 100; *Ford* v. *State,* 46 Neb. 390, 64 N. W. 1082.

In the last place, it makes no difference in the first place. Petitioner cites (p. 71, his brief) some old cases holding under a former statute that a conviction would be reversed where it appeared that the defendant had not been arraigned prior to trial. The first three cases he cites were all decided before the statutes hereinafter mentioned were amended. The last case, *Ex parte Resler,* was decided after the amendment, but is not even remotely in point.

In a number of cases prior to 1925, it had happened that defendants created enough confusion so that the court and everybody else forgot to arraign them before

trial, and the defendants then went ahead with the trial and got themselves convicted and then raised the point after conviction that they had never been asked with due formality whether they were guilty or not. The Supreme Court, under the statute as it existed at that time, felt obliged to hold, and did hold, that all the proceedings were void unless the defendants were asked certain magic words, unless the court had duly previously stood the defendant up and said, "Prisoner at the bar, to this information what do you say, guilty or not guilty?" Nebraska never went so far as to authorize pressing for a plea with big rocks on the defendant's chest, but an arraignment was essential up until 1925. In that year the legislature, recognizing the ridiculousness of the rule, amended what is now Section 29-1815, Comp. St. 1929, so that it read in part at the time of petitioner's trial in the district court:

> "If the accused appear in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he shall be deemed to have waived arraignment, and a plea of not guilty deemed to have been plead."

So if petitioner's theory that the back-room arraignment is void is correct, he is simply in the position of not having been arraigned at all, and the above-quoted statute settles the matter. And so the Supreme Court has held, but this is a matter of state procedure anyway. This court has held that putting a defendant on trial without arraignment is not a denial of due process. *Garland* v. *Washington*, 34 Sup. Ct. 456, 232 U. S. 642, 58 L. Ed. 772. In this case, the court said:

> "It is apparent that the accused was tried and convicted upon an informaion charging an offense

against the law; that he had a jury trial with full opportunity to be heard, and that he was in fact deprived of no right or privilege in the making of his defense, unless such deprivation arises from the fact that he was not arraigned and required to plead to the second information before trial. The object of arraignment being to inform the accused of the charge against him and obtain an answer from him was fully subserved in this case, for the accused had taken objections to the second information, and was put to trial before a jury upon that information in all respects as though he had entered a formal plea of not guilty. In this view, the supreme court of Washington, following its former decisions, held that the failure to enter the plea had deprived the accused of no substantial right, and that having failed to make objection upon that ground before trial, it was waived and could not be subsequently taken. This ruling, it is contended, deprived the plaintiff in error of his liberty without due process of law within the meaning of the 14th Amendment of the Constitution.

"Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficieint notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers v. Peck, 199 U. S. 425, 435, 50 L. ed. 256, 260, 26 Sup. Ct. Rep. 87, and previous cases in this court there cited. Tried by this test it cannot for a moment be maintained that the want of formal arraignment deprived the accused of any substantial right, or in any wise changed the course of trial to his disadvantage."

See also *In re Krug,* 79 Fed. 308.

In fact the power of a state over its methods of procedure is substantially unrestricted by the due process

clause of the Federal Constitution. *Jordan* v. *Massachusetts*, 225 U. S. 167, 56 L. Ed. 1038, 32 Sup. Ct. 651.

Point 5.

No Federal Question Is Involved in the Action of the Court in Going to Trial at a Time When One of Defendant's Witnesses Was Dead and the Others in the Army and When Counsel Preferred a Continuance.

Petitioner complains (his brief, p. 78, et seq.) that he was forced to trial when his counsel was "serious ill," when one witness he wanted to use was dead, and others were in the army.

As far as Mr. North's illness is concerned, the record does not show that petitioner was in any wise prejudiced by the condition of counsel's health. Although it is said (p. 78, petitioner's brief) that if Mr. North had to withdraw, the case would have been tried by a counsel unfamiliar with the facts, it is said elsewhere (R. p. 74) that Mr. Bryce Crawford, or "Babe" (R. p. 82) was co-counsel in the case.

As a matter of fact, it looks as though all this talk about co-counsel and being "serious ill" was just simply part of an effort to get a continuance.

And the same thing may be said about the motion for continuance on the one hand and the objection to trial on the other hand, because of the absent witnesses. It is true that Ray Agosta died just before the trial started. But it was not shown that the continuance would remedy that situation. And as we have elsewhere pointed out, none of these other witnesses had anything material to offer in the way of evidence.

The granting or denial of a continuance is a matter which necessarily rests within the discretion of the trial court. *Taylor* v. *State*, 86 Neb. 795, 126 N. W. 752; *Cockeram* v. *State*, 121 Neb. 757, 238 N. W. 524; *Cornell* v. *State*, 138 Neb. 708, 294 N. W. 851. The discretion is wide when the application is made on the eve of trial. *Smith* v. *State*, 109 Neb. 579, 191 N. W. 687. Unless prejudice clearly appears, there is no abuse of discretion in refusing a continuance. *Flanagan* v. *State*, 127 Neb. 640, 256 N. W. 321.

Such is the law of Nebraska, and where there is nothing in the record showing an abuse of discretion, refusing a continuance does not present a case of denial of due process. *Seaboard Air Line Ry.* v. *Koennecke*, 36 Sup. Ct. 126, 239 U. S. 352, 60 L. Ed. 324; *Franklin* v. *South Carolina*, 30 Sup. Ct. 640, 218 U. S. 161, 54 L. Ed. 980. And this is true even where the testimony of the absent witnesses is material. *Minder* v. *Georgia*, 183 U. S. 559, 46 L. Ed. 328, 22 Sup. Ct. 224.

If the theory is that the refusal to grant a continuance was tantamount to a denial of the assistance of counsel, the answer is furnished by *Avery* v. *Alabama*, 60 Sup. Ct. 321, 308 U. S. 444, 84 L. Ed. 377.

Point 6.

The Alleged Insufficiency of the Evidence to Sustain a Conviction Does Not Present a Federal Question, and Anyway the Entire Evidence is Not Submitted to the Court With Petitioner's Application.

The petitioner devotes a few pages (his brief, p. 100, et seq.), without citing any authorities, to contending that he should not have been convicted by the jury.

In the first place, there is no possible way that this court may know whether the evidence is or is not sufficient to sustain a conviction, because practically none of the evidence is before the court. The judgment is entitled to all the usual presumptions and the Supreme Court of Nebraska has said the evidence is amply sufficient to sustain a conviction.

But assuming *arguendo* that there were something to the argument, the petitioner has been fully heard in the regular course of judicial proceedings and the due process clause implies no guarantee against an erroneous decision of a state court. *Central Land Company* v. *Laidley*, 16 Sup. Ct. 80, 159 U. S. 112, 40 L. Ed. 91; *Filer* v. *State*, 36 Sup. Ct. 550, 241 U. S. 648, 60 L. Ed. 1220; *Frank* v. *Mangum*, 237 U. S. 309, 59 L. Ed. 969, 35 Sup. Ct. 582.

Point 7.

The Constitution of the Unitied States Does Not Guarantee a Speedy Trial of Criminal Cases in State Courts.

The petitioner in his brief under point 1 (p. 28, et seq.) starts out with the proposition that he was "denied a speedy public trial in violation of Sec. 1 of Article XIV of the Amendments to the Constitution."

He follows this with the particulars that a complaint was not filed with the examining registrate for two days after his arrest, that the preliminary hearing was continued from February 27, 1942, to March 5, 1942; that he was not tried in the district court for about one year.

Reference is also made to the fact that his counsel was "serious ill."

He then sets out the provision of the Nebraska Constitution (petitioner's brief, p. 30) which guarantees a speedy public trial in all criminal prosecutions.

His entire argument, then (petitioner's brief, pp. 30-63), is devoted to a consideration of what constitutes a speedy trial, and to the right to a speedy trial in state courts under state constitutions and in federal courts under the federal constitution.

Of course, a sufficient answer to this argument is that the United States Constitution guarantees no speedy trial in criminal prosecutions in state courts. The 6th Amendment which contains the only reference to speedy trials to be found in the Constitution is not a limitation upon the powers of the states. *Gaines* v. *Washington*, 277 U. S. 81, 72 L. Ed. 793, 48 Sup. Ct. 468; *Palko* v. *Connecticut*, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288; *Betts* v. *Brady*, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. 1252; *Eilenbecker* v. *Plymouth County*, 134 U. S. 35, 10 Sup. Ct. 424, 33 L. Ed. 801; *Howard* v. *Kentucky*, (Ky. 1906) 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421; *West* v. *Louisiana*, (La. 1904) 194 U. S. 264, 24 Sup. Ct. 650, 48 L. Ed. 965; *Bolln* v. *Nebraska*, (1900) 176 U. S. 87, 20 Sup Ct. 287, 44 L. Ed. 382; *Brown* v. *New Jersey*, (N. J. 1899) 175 U. S. 174, 20 Sup. Ct. 77, 44 L. Ed. 119; *Brown* v. *Walker*, (Pa. 1896) 161 U. S. 606, 16 Sup. Ct. 644, 40 L. Ed. 819; *Spies* v. *Illinois*, (Ill. 1887) 123 U. S. 131, 166, 8 Sup. Ct. 21, 22, 31 L. Ed. 80.

The Supreme Court of Nebraska has construed the Nebraska Constitution and has said: "Under the facts in this case, we find that the defendant had a speedy trial within the (Nebraska) constitutional provision."

Whether the state court erred in its construction of the State Constitution is not a federal question. *West* v. *Louisiana*, 194 U. S. 258, 24 Sup. Ct. 650, 48 L. Ed. 965; *Howard* v. *Kennedy*, 200 U. S. 164, 26 Sup. Ct. 189, 50 L. Ed. 421.

The petitioner apparently attempts to avoid the effect of this rule by contending that the denial of a speedy trial in a state court is a denial of due process within the meaning of the 14th Amendment to the Federal Constitution (see his brief, p. 28).

The *usus loquendi* of the Constitution itself denies this construction.

The 14th Amendment, of course, is a limitation upon the states. Section 1 thereof prohibits a state from denying due process in a criminal case.

The 5th Amendment prohibits the United States from denying due process in federal courts. Yet, it was thought necessary to adopt the 6th Amendment also to guarantee the right to a speedy trial in the federal courts. Now obviously there was no reason for the 6th Amendment if a speedy trial was already guaranteed under the due process clause of the 5th Amendment, and since we cannot accuse the framers of the amendments of using superfluous words, it must be assumed that "due process of law," as used in the 5th Amendment, does not include the right to a speedy and public trial as guaranteed in the 6th Amendment. And since identical language is used in the 5th and 14th Amendments, it must be assumed that the phrase "without due process of law" in the 14th Amendment means the same thing as the same phrase in the 5th Amendment means. Hence, the requirement of the 14th Amendment that no state

deprive any person of liberty without due process of law does not guarantee a speedy trial in a state court.

A parallel situation has been passed upon by this court.

In *Hurtado* v. *California*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 232, the court considered the question whether the due process clause of the 14th Amendment required an indictment by a grand jury in a prosecution by a state for murder. In the course of the opinion the court said:

> "We are to construe this phrase in the 14th Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the 5th Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions, for the more aggravated crimes under the laws of the United States. It declares that 'No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself.' It then immediately adds: 'nor be deprived of life, liberty or property, wihout due process of law.' According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume without clear reason to the contrary, that any part of this most important Amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, 'due process of law' was not meant or intended to include, *ex vi termini*, the institution and procedure of a

grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the 14th Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that Amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the 5th Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land, which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the 14th Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. 'The 14th Amendment,' as said by Mr. Justice Bradley in Mo. v. Lewis, (supra), 'does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.'

* * *

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these

principles of liberty and justice, must be held to be due process of law."

In *Palko* v. *Connecticut*, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288, it appears that Connecticut permitted the state to take an appeal and upon reversal to retry a defendant. The defendant was convicted of second degree murder on the first trial. The state had a reversal and on the second trial the defendant got himself sentenced to death. The Supreme Court of Errors of Connecticut held that this did not constitute double jeopardy. The Constitution of Connecticut prohibits double jeopardy. The Fifth Amendment to the United States Constitution also prohibits double jeopardy. In the opinion the United States Supreme Court said:

> "The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be 'subject for the same offense to be twice put in jeopardy of life or limb.' The Fourteenth Amendment ordains, 'nor shall any state deprive any person of life, liberty, or property, without due process of law.' To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. Thirty-five years ago a like argument was made to this court in Dreyer v. Illinois, 187 U. S. 71, 85, 47 L. ed. 79, 86, 23 S. Ct. 28, and was passed without consideration of its merits as unnecessary to a decision. The question is now here.
>
> * * *

"We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

"The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Gaines v. Washington, 277 U. S. 81, 86, 72 L. ed. 793, 48 S. Ct. 468. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. Twining v. New Jersey, 211 U. S. 78, 106, 111, 112, 53 L. ed. 97, 109, 111, 112, 29 S. Ct. 14. Cf. Snyder v. Massachusetts, supra (291 U. S. p. 105, 78 L. ed. 677, 54 S. Ct. 330, 90 A. L. R. 575); Brown v. Mississippi, 297 U. S. 278, 285, 80 L. ed. 682, 56 S. Ct. 461. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494; New York C. R. Co. v. White, 243 U. S. 188, 208, 61 L. ed. 667, 677, 37 S. Ct. 247, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629, 13 N. C. C. A.

943; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232, 67 L. ed. 961, 964, 43 S. Ct. 589. As to the Fourth Amendment, one should refer to Weeks v. United States, 232 U. S. 383, 398, 58 L. ed. 652, 658, 34 S. Ct. 341, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and as to other provisions of the Sixth, to West v. Louisiana, 194 U. S. 258, 48 L. ed. 965, 24 S. Ct. 650.

* * *

"We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra (211 U. S. p. 99, 53 L. ed. 106, 29 S. Ct. 14).

* * *

"* * * Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?' Hebert v. Louisiana, 272 U. S. 312, 71 L. ed. 270, 47 S. Ct. 103, 48 A. L. R. 1102, supra. The answer surely must be 'no.'"

In this discussion we have treated the matter as though a preliminary hearing is a trial which the Constitution guarantees shall be speedy. However, it is elementary that the constitutional guarantee extends only to the trial itself and not to the proceedings leading up to the trial.

In view of the foregoing considerations, it would seem to be perfectly clear that the due process clause of the 14th Amendment does not guarantee this petitioner a speedy trial, as such, in the state court.

Point 8.

All the Things Charged by Petitioner Put Together, Even If True, Do Not Constitute a Denial of Due Process; a Trial Which Does Not Violate Fundamental Principles of Fairness and Justice, and of Which the Defendant Was Given Due Notice and in Which He Was Given an Opportunity to be Heard Meets All Requirements of the Federal Constitution.

Ordinarily "law, in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the constitutional requisition is satisfied." *Caldwell* v. *Texas,* 137 U. S. 698, 11 Sup. Ct. 224, 34 L. Ed. 816. And due process is so secured by laws operating on all alike and not subjecting an individual to the arbitrary exercise of the powers of government. (Idem.)

In *Betts* v. *Brady,* supra, this court has said that an asserted denial of due process "is to be tested by an appraisal of the totality of facts in a given case."

In *Frank* v. *Mangum,* 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969, it was contended that the "due process" clause was violated in a Georgia murder prosecution. The opinion is quite long, but the following portion is applicable. On page 979 of the L. Ed. the court said:

> "As to the 'due prcoess of law' that is required by the 14th Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the

> Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. (Citing cases.)"

All the 14th Amendment guarantees, so far as state procedure is concerned, is notice, an opportunity to be heard, and a trial which does not violate fundamental principles of fairness. In *Snyder* v. *Massachusetts,* 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 595, it was said:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Twining v. New Jersey, 211 U. S. 78, 106, 111, 112, 53 L. ed. 97, 109, 111, 112, 29 S. Ct. 14; Rogers v. Peck, 199 U. S. 425, 434, 50 L. ed. 256, 260, 26 S. Ct. 87; Maxwell v. Dow, 176 U. S. 581, 604, 44 L. ed. 597, 606, 20 S. Ct. 448, 494; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292; Frank v. Mangum, 237 U. S. 309, 326, 59 L. ed. 969, 979, 35 S. Ct. 582; Powell v. Alabama, 287, U. S. 45, 67, 77 L. ed. 158, 169, 53 S. Ct. 55, 84 A. L. R. 527. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar. Consistently with that amendment, trial by jury may be abolished. Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Maxwell v. Dow, 176 U. S. 581, 44 L. ed. 597, 20 S. Ct. 448, 494, supra; New York C. R. Co. v. White, 243 U. S. 188, 208, 61 L. ed. 667,

667, 37 S. Ct. 247, L. R. A. 1917D, 1, Ann. Cas. 1917D, 629 13 N. C. C. A. 943; Wagner Electric Mfg. Co. v. Lyndon, 262 U. S. 226, 232, 67 L. ed. 961, 964, 43 S. Ct. 589. Indictments by a grand jury may give way to informations by a public officer. Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 S. Ct. 111, 292, supra; Gaines v. Washington, 277 U. S. 81, 86, 72 L. ed. 793, 795, 48 S. Ct. 468. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14, supra. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 S. Ct. 14, supra; Powell v. Alabama, supra (287 U. S. 68, 71, 77 L. ed. 170, 171, 53 S. Ct. 55); Holmes v. Conway, 241 U. S. 624, 60 L. ed. 1211, 36 S. Ct. 681. Cf. Blackmer v. United States, 284 U. S. 421, 440, 76 L. ed. 375, 384, 52 S. Ct. 252.

* * *

"So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

"We are thus brought to an inquiry as to the relation between the defendant's presence at a view and the fundamental justice assured to him by the Constitution of the United States."

Elsewhere in the opinion the court said (p. 684 of 78 L. Ed.):

"The Fourteenth Amendment has not said in so many words that he must be present every second or minute or even every hour of the trial. If words so inflexible are to be taken as implied, it is only

because they are put there by a court, and not because they are there already, in advance of the decision. Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results. 'The due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall.' Owenbey v. Morgan, supra (256 U. S. p. 110, 65 L. ed. 845, 41 S. Ct. 433, 17 A. L. R. 873)."

And still later in the opinion (p. 686 of 78 L. Ed.) the court said:

"The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

"The constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the People of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged semper ubique et ab

omnibus (Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 327, 23 S. Ct. 168), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In the same opinion the following language is found in the dissent of Mr. Justice Roberts (p. 689 of 78 L. Ed.):

"The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life. It is fundamental that there can be no due process without reasonable notice and a fair hearing. Though the usual and customary forms of procedure be disregarded, it safeguards the defendant's substantial rights."

In *Palko* v. *Connecticut*, 302 U. S. 319, 58 Sup. Ct. 149, 82 L. Ed. 288, the court said:

"We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that

neither liberty nor justice would exist if they were sacrificed. Twining v. New Jersey, supra (211 U. S., p. 99, 53 L. ed. 106, 29 S. Ct. 14)."

There is nothing so precious about a speedy trial that it may be said that the doctrine of the 6th Amendment has been absorbed by the 14th Amendment. The only possibility of a delay in trial constituting a denial of due process would be where the delay was so great and other factors contributed to a situation where there would be no possibility of justice. Therefore, while if we were dealing with a speedy trial constitutional provision as such, prejudice would not be involved, but in the case at bar, we submit that petitioner must go further than showing a mere delay and show great prejudice as a result thereof before he may invoke the provisions of the 14th Amendment. And in any event, he must show that he demanded a speedy trial. *Frankel* v. *Woodrough*, 7 Fed. (2d) 796. And in the case at bar it would seem that he must go further and show that he demanded trial at a time when the witnesses, of whose absence he now complains, were available.

So assuming that it would have been nice if defendant had had his immaterial witnesses present, if Mr. Agosta had not died, if Mr. North had felt better, if the trial court had ~~conducted~~ continued the case, the question now to be determined is whether, under all the facts and circumstances as reflected by this record, this court can say that there has been such a denial of fundamental fairness, shocking to the universal sense of justice which men possess, as amounts to an absolute denial of a hearing.

Unless the court can say that this is so, it is, we submit, the duty of the court to deny this application.

Respectfully submitted,

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